

Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **200812024**

Release Date: 3/21/2008

CC:ITA:B04:

PRENO-104948-08

UILC: 152.00-00

date: February 08, 2008

to: Lynne M. Morrison
Team Lead, Program Evaluation & Support
EITC Office
Electronic Tax Administration & Refundable Credits
(Wage & Investment)

from: Donna Welsh
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)

subject: Tax Benefits for Member of Household

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

I. Background

Section 151(c) allows a taxpayer to claim an exemption deduction for the taxpayer's dependents. Section 152(a) provides, in general, that the term "dependent" means a qualifying child or a qualifying relative. Section 152(c) provides that a "qualifying child" means, with respect to any taxpayer, an individual (1) who bears a certain relationship to the taxpayer, (2) has the same principal place of abode as the taxpayer for more than one-half of the taxable year, (3) meets certain age requirements, and (4) who has not provided more than half of his or her own support.

Section 152(d)(1) provides that the term "qualifying relative" means, with respect to any taxpayer, an individual (1) who bears a certain relationship to the taxpayer as described in Section 152(d)(2), (2) whose gross income for the year is less than the exemption amount, (3) who derives more than half of his or her support from the taxpayer, and (4)

who is not a qualifying child of any other taxpayer. Sections 152(d)(2)(A) through (G) provide types of “familial relationships” (e.g. child, parent, sibling, niece, nephew, etc.) that satisfy the relationship requirement. Section 152(d)(2)(H) provides an additional “non-familial relationship” for a member of the taxpayer’s household.

Notice 2008-5, 2008-2 I.R.B. 256, provides guidance on individuals who may be a *qualifying relative* of a taxpayer under section 152(d). Specifically, the Notice clarifies that, solely for purposes of section 152(d)(1)(D), an individual is not a qualifying child of “any other taxpayer” if the individual’s parent (or other person with respect to whom the individual is defined as a qualifying child) is not required by section 6012 to file an income tax return and (i) does not file an income tax return, or (ii) files an income tax return solely to obtain a refund of withheld income taxes. The Notice clarifies that a taxpayer may claim a dependency exemption deduction for an unrelated child of an unrelated individual who lived with the taxpayer as a member of the taxpayer’s household for the entire year.

You have asked whether a taxpayer may claim other family tax law benefits based on a member of the taxpayer’s household who is a qualifying relative, including the earned income credit, head of household filing status, the child tax credit, and the child and dependent care credit. Whether a taxpayer may claim these family tax law benefits depends on the relationship of the taxpayer to the individual.

II. Law and Analysis

A. Section 32 – Earned Income Credit

Section 32(a)(1) provides that, in the case of an eligible individual, there shall be allowed as a credit against the tax imposed by this Subtitle A an amount equal to the credit percentage of so much of the taxpayer’s earned income for the taxable year as does not exceed the earned income amount. Section 32(c)(1) provides that, in general, the term “eligible individual” means (i) any individual who has a qualifying child for the taxable year, or (ii) any other individual who does not have a qualifying child for the taxable year, if certain requirements are met, such as age, residency, and that the individual is not a dependent of someone else.

Conclusion:

A taxpayer who may claim an individual as his or her *qualifying relative* under Notice 2008-5 may not use that individual for purposes of claiming the earned income credit because the credit requires that the dependent be a *qualifying child*, not a qualifying relative, of the taxpayer.

B. Section 2 – Head of Household Filing Status

Section 2(b)(1) provides that for purposes of Subtitle A, an individual shall be considered a head of a household if, and only if, such individual is not married at the close of his taxable year, is not a surviving spouse, and either (1) maintains as his home a household which constitutes for more than one-half of the taxable year the principal place of abode, as a member of such household, (i) a qualifying child of the individual, or (ii) any other person who is a dependent of the taxpayer, if the taxpayer is entitled to a deduction under section 151 for the taxable year, or (2) maintains a household which constitutes for such taxable year the principal place of abode of the father or mother of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such father or mother under section 151.

Section 2(b)(3) limits the applicability of section 2(b)(1) and provides that a taxpayer shall not be considered a head of a household (1) if at any time during the taxable year he is a non-resident alien, or (2) by reason of an individual who would not be a dependent for the taxable year but for (i) section 152(d)(2)(H) or (ii) section 152(d)(3), relating to multiple support agreements.

Conclusion:

A taxpayer who may claim an individual as his or her *qualifying relative* under Notice 2008-5 because that individual was a member of the taxpayer's household, but who does not have a specified familial relationship to the individual, may not claim head of household filing status.

C. Section 24 – Child Tax Credit

Section 24(a) provides that there shall be allowed as a credit against the tax imposed by this chapter for the taxable year with respect to each qualifying child of the taxpayer an amount equal to \$1000.

Conclusion:

A taxpayer who may claim an individual as his or her *qualifying relative* under Notice 2008-5 may not use that individual for purposes of claiming the child tax credit because the credit requires that the dependent be a *qualifying child*, not a qualifying relative, of the taxpayer.

D. Section 21 – Dependent Care Credit

Section 21(a) provides that in the case of an individual for which there are 1 or more qualifying individuals (as defined in subsection (b)(1)) with respect to such individual, there shall be allowed as a credit against the tax imposed by chapter 1 an amount equal to the applicable percentage of the employment-related expenses paid by such individual during the taxable year.

Section 21(b)(1) provides that the term “qualifying individual” means (1) a dependent of the taxpayer (as defined in section 152(a)(1)) who has not attained age 13, (2) a dependent of the taxpayer (as defined in section 152 determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B)) who is physically or mentally incapable of caring for himself or herself and who has the same principal place of abode as the taxpayer for more than half of the year, or (3) the spouse of the taxpayer, if the spouse is physically or mentally incapable of caring for himself or herself and who has the same principal place of abode as the taxpayer for more than half of the taxable year.

Conclusion:

Section 152(a)(1) provides that a dependent is a *qualifying child*, therefore, the dependent care credit is limited to taxpayers with one or more *qualifying children* under the age of 13. A taxpayer who may claim an individual as his or her *qualifying relative* may not claim the dependent care credit, unless that qualifying relative is physically or mentally disabled.

Please call (202) 622-4920 if you have any further questions.